No. 13554

IN THE

United States

Court of Appeals

For the Ninth Circuit

GROVER C. SCHLAADT, SR., and GARFIELD SCHLAADT,
Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN, Husband and Wife; FRED JAHNKE and EMMA JAHNKE, Husband and Wife; and EMIL ZIMMERMAN as the Executor of the Last Will and Testament of JOHN HENRY KUCKS, Deceased,
Appellees.

ANSWER BRIEF OF APPELLEES

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

PHILIP S. BROOKE,
912 Paulsen Bldg.
Spokane 1, Washington.
FLOYD J. UNDERWOOD,
Davenport, Washington.

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I

ADDITIONAL STATEMENT

Appellants' statement is confined to a summary of the findings of fact. Notwithstanding the court made the proper conclusions of law, we still wish to urge that the evidence was insufficient to support the finding that the alleged oral agreement was entered into by Catharina Schlaadt and John Henry Kucks.

The only testimony as to the alleged oral agreement was that of Arletha M. Schlaadt, wife of Grover Schlaadt, Grover Schlaadt, Jr., and his wife, Neva Schlaadt. While these witnesses were not interested to the extent of being parties to the action, they are all related to the appellants and it can hardly be gainsaid that they were not vitally interested in the outcome of the action.

Their testimony was to the effect that John Henry Kucks had said that if Catharina Schlaadt would marry him he would leave all of his property to the plaintiffs. According to Arletha Schlaadt, the deceased did not say how he was going to divide the land but later said he was going to leave the Davenport farm to Grover and the Canada land to Garfield (R. 93).

Garfield Schlaadt, Jr., testified that John Henry Kucks made the statement that if the two of them got married he would leave his property ultimately to the boys. He made no statement as to how the land was to be divided (R. 133, 138).

Neva Schlaadt also testified that she heard John Henry Kucks say that he had promised Catharina Schlaadt that if she would marry him her two boys would be left his estate but did not say how the land would be divided (R. 116, 117).

The only other testimony was with respect to statements purported to have been made by Catharina Schlaadt to the foregoing witnesses, all of which was admitted over objection of counsel for respondent and admitted by the trial court for the sole purpose of showing the state of mind of Catharina Schlaadt (R. 79, 80, 114, 116, 121, 131).

The first will made out by the decedent left all of his property to Catharina Schlaadt and none of the subsequent wills left all of his property to the appellants nor did any of them leave the Davenport property to Grover or the Canada land to Garfield (Exs. 4-8).

At the conclusion of plaintiffs' evidence, the defendants moved the court for an order dismissing the complaint on the ground and for the reason that the plaintiffs had failed to prove the allegations thereof by any substantial evidence and on the further ground that the agreement relied upon by the terms of which it is claimed the defendant agreed to devise property is void and unenforcible under the Statute of Frauds of the State of Washington, because not in writing. The motion was also urged upon the additional ground that the sole consideration of the contract was marriage and that there was not sufficient performance

of the contract to surmount the Statute of Frauds. After extended argument by counsel and examination of the authorities by the court, the motion was granted and judgment of dismissal entered based upon findings of fact and conclusions of law.

We wish to quote Conclusion of Law I which reads as follows (R. 21):

> "That the oral contract entered into by and between Catharina Schlaadt and John Henry Kucks during the month of June, 1944, by the terms of which the said John Henry Kucks agreed to leave his property to the plaintiffs in consideration of the said Catharina Schlaadt marrying him, was void and unenforcible under the statute of frauds of the State of Washington, and that neither the execution of the wills dated May 24th, 1945, and February 11th, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds."

II

ARGUMENT

A. Oral Agreement Not Established by Clear and Convincing Evidence.

We appreciate that the findings of the trial court are presumptively correct but nevertheless we do not believe that the alleged prenuptial oral agreement was established by that degree of evidence required by the Supreme Court of the State of Washington to establish such contracts.

Our understanding is that as respondents we may urge any matter appearing in the record in support of the judgment.

Lettille v. Scofield, 308 U. S. 415, 84 L. Ed. 355;
Standard Accident Ins. Co. v. Roberts (8th Circuit), 132 Fed. (2) 794;
Kansas City Life Ins. Co. v. Wells (8th Circuit), 133 Fed. (2) 224.

Respondents therefore contend that the trial court not only decided the case correctly because of the proper conclusions of law but for the further reason that the oral agreement was not established by that degree of proof required in the State of Washington.

Resor v. Schaefer, 193 Wash. 91, 74 Pac. (2) 917.

It is the law of the State of Washington that contracts to devise or bequeath property are enforcible but the Supreme Court has definitely and firmly adopted the rule that an oral promise to make a will or an oral promise to devise or bequeath property must be established by evidence *that it is conclusive, definite, certain and beyond all legitimate controversy.* (Italics ours.)

Such contracts are not favored in law and are viewed with suspicion by the courts.

Allen v. Dillard, 15 Wash. (2) 35, 129 Pac. (2) 813.

Specific performance may be granted in a proper case, but because of the great opportunity for fraud and because of the reluctance on the part of the courts to render ineffective a subsequent will of a testator, a contract to make mutual wills must be established by clear and convincing evidence.

Widman v. Maurer, 19 Wash. (2) 28, 141 Pac. (2) 135.

Oral contracts are viewed with suspicion by the courts, but enforcible if the terms of the contract, the intention of the parties and the adequacy of the consideration are established to the satisfaction of the court.

Jennings v. D'Hooge, 25 Wash. (2) 702, 172 Pac. (2) 189.

Cases of this kind are not favored and when the promise rests in parol, are even regarded with suspicion and will not be enforced except upon the strongest evidence that the contract was founded upon a valuable consideration and deliberately entered into by the deceased. The court in this case indicated that each case must rest upon its own peculiar facts and circumstances but holds that the facts appearing in formerly adjudicated cases must be a guide to the determination of each case as it comes to the courts for decision, so that there will not be different decisions on cases that are alike as to the facts. The court reviews the thirty-seven cases of the court on this subject and makes the observation that in twelve cases contracts were held to be valid and in twenty-five cases enforcement of the alleged contracts was denied.

Thomas v. Hensel, 38 Wash. (2) 457, 230 Pac. (2) 290.

In order to establish an oral contract to devise it is necessary to show by evidence that it is conclusive, definite, certain and beyond legitimate controversy:

1. That contract was entered into;
2. That services were actually performed;
3. That services were performed in reliance on the contract.

In this case recovery was denied because the court held that there had been an abandonment of the oral contract to care for decedent.

Henry v. Henry, 138 Wash. 284, 286, 244 Pac. 686, 687.

"It is useless to repeat what has been so often said in this character of cases, that the courts look upon such claims with suspicious eyes. The evasion of the statutory requirements that some evidence of such an agreement should be in writing, is not to be easily tolerated. Even a slight experience justifies the conclusion that the overwhelming majority of such claims are founded upon no greater basis than a desire to acquire property which was never intended to be so disposed. The evidence, to sustain such oral promises, we have said, must be conclusive, definite, certain and beyond all legitimate controversy. *Frederick v. Michaelson,* ante p. 55, 244 Pac. 119; *Eidinger v. Mamlock,* ante p. 276, 244 Pac. 684; *Fields v. Fields,* 137 Wash. 592, 243 Pac. 369. We are prepared to make, and are justified in making, a statement even more stringent than that, and to hold that one seeking to establish an oral contract, whereby property of the deceased is sought to be taken, must establish all the elements of the contract and a right to have it enforced beyond all reasonable doubt. Without such a rule, no estate of any considerable size is safe from claims that it has been devised and bequeathed by word of mouth."

Wayman v. Miller, 195 Wash. 457, 81 Pac. (2) 501 approves and quotes from *Henry v. Henry,* supra.

Jansen v. Campbell, 37 Wash. (2) 879, 884; 227 Pac. (2) 175, 178:

"In a subsequent case, *Jennings v. D'Hooge,* 25 Wash. (2) 702, 172 Pac. (2) 189, we held that

cases seeking specific performance of contracts to devise are not favored and, when the promise rests in parol, are even regarded with suspicion, and such a contract will not be enforced except upon the strongest evidence that it was founded upon a valuable consideration and deliberately entered into by the deceased; and it cannot be established by the acts of one party alone."

B. Contract Void Under Statute of Frauds.

Counsel for appellants apparently concede that the oral contract was void by virtue of the following provisions of the Statute of Frauds of the State of Washington.

Revised Code of Washington, Sec. 11.12.020:

> "Every will shall be in writing signed by the testator or testatrix, or by some other person under his or her direction in his or her presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator or testatrix by his or her direction or request * * *."

Revised Code of Washington, Sec. 64.04.010:

> "*Conveyances and encumbrances to be by deed.* Every conveyance of real estate or any interest therein, and every contract creating or evidencing an encumbrance upon real estate, shall be by deed: * * *."

Revised Code of Washington, Sec. 64.04.020:

> "*Requisites of a deed.* Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized to take acknowledgments of deeds."

Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862:

> If a contract to devise real estate is void, it cannot be enforced as to the personalty either, for being void in part it is void as a whole.

In re. Edwall Estate, 75 Wash. 391, 134 Pac. 1041:

> Oral contract to devise real estate is within the statute of frauds.

In re. Tveekrem's Estate, 169 Wash. 468, 14 Pac. (2) 3:

In re. Fischer's Estate, 196 Wash. 41, 48, 81 Pac. (2) 836, 839:

> "A contract to devise real estate or to bequeath and devise both real and personal property is within the statute of frauds and to escape the nullifying effect of the statute a sufficient part performance or full performance of the contract must be shown."
>
> *Jennings v. D'Hooge,* 25 Wash. (2) 702, 172 Pac. (2) 189;
>
> *Page on Wills,* Lifetime Edition, Sec. 1716 at page 855 and Sec. 1717 at page 857.

The alleged oral contract was also void by virtue of the following provision of the Statute of Frauds of the State of Washington:

Revised Code of Washington, Sec. 19.36.010:

> "Contracts, etc., void unless in writing. In the following cases any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, is in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized:

(1) * * *;
(2) * * *;
(3) Every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry";
* * *"

Koontz v. Koontz, 83 Wash. 180, 145 Pac. 201:

The court held that an understanding before marriage that when the other should die, the survivor should have no interest in the decedent's estate, was a promise made upon consideration of marriage and void under the statute of frauds unless made in writing. The court abolished any distinction between a promise made in expectation or contemplation of marriage as distinguished from a promise made upon consideration of marriage.

Rogers v. Joughin, 152 Wash. 448, 453, 277 Pac. 988, 990:

"But the agreement itself as testified to by appellant was made before marriage, and the first mutual wills were executed before marriage, and under Rem. Comp. Stat. Sec. 5825, the agreement was void, there being in this state no distinction between contemplation of marriage and consideration of marriage. *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201."

Allen v. Dillard, 15 Wash. (2) 35, 48, 129 Pac. (2) 813, 818, quotes from *Rogers v. Joughin,* supra, to the proposition that an oral agreement to make mutual wills in consideration of marriage is void under the statute of frauds.

Page on Wills, Lifetime Edition, par. 1712, page 851, notes that marriage is sufficient consideration to sup-

port a contract to make a will but states that the State of Washington holds to the contrary and cites the case of *Wasmund v. Wasmund,* 145 Wash. 394, 260 Pac. 259.

49 Amer. Juris. par. 16, page 376:

> "*Agreements to which statute applies*: It seems to be well settled that any verbal executory promise or agreement other than mutual promises to marry, made in consideration of marriage, whether with the promisor or a third person, is embraced within the provision of the statute of frauds requiring that 'agreements made upon consideration of marriage * * * shall be in writing, and signed by the party to be charged therewith.' This rule has been applied to a great many fact situations involving promises made by one of the prospective spouses, such as promises to make a monetary settlement on an intended wife or to convey specified real property to her, promises by the prospective wife to convey property to the intended husband, promises by either to transfer bonds or negotiable instruments to the other, promises by either to execute a will in favor of the other, promises by the prospective husband to release interests in the intended wife's property, and similar promises by the prospective wife to the intended husband with reference to his property."

37 C. J. S., par. 4, page 516:

> "The various jurisdictions of this country have enacted statutes similar to the provision of the English statute of frauds that no action shall be brought to charge any person on any agreement made in consideration of marriage, unless the agreement or some memorandum or note thereof should be in writing and signed by the party to be charged therewith or some person by him lawfully authorized. With the exception of mutual promises to marry, discussed infra par. 6, such provisions apply to all oral agreements which are

> founded on a consideration of marriage, either with the promisor or with a third person, and render them unenforceable, notwithstanding other statutory provisions that all contracts made between persons in contemplation of marriage shall remain in full force after such marriage takes place."

Note: 10 A. L. R. 321, citing *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201, supplemented in 21 A. L. R. 311.

There is no doubt but that the alleged oral agreement is void by reason of the foregoing statutes of the State of Washington. The question to be resolved is whether the marriage of Catharina Schlaadt to John Henry Kucks and the making of the wills which were subsequently revoked, constitute sufficient performance to take the contract out of the Statute of Frauds.

C. Marriage Not Sufficient Performance to Remove Bar of Statute.

The only oral agreement as alleged in the complaint and as found by the court is that in consideration of John Henry Kucks agreeing to leave all of his property to her two sons, Catharina Schlaadt agreed and promised to marry him which she did on August 11th, 1944. (R. 4, 16.)

We quote from the testimony of Neva Schlaadt, the daughter-in-law, as follows: (R. 121.)

> "Q. And the sole proposition was that if she would marry him he would leave his property to the two boys?
>
> A. Yes, that's right.

Q. And did he say how it would be divided?

A. No, he didn't tell us that.

Q. And that was the entire agreement, was it, Mrs. Schlaadt?

A. Yes."

Counsel for appellant also stipulated that the sole consideration for the agreement was the marriage and the other matters that would necessarily follow therefrom. (R. 121-22.)

"Q. And then once again you heard that same—

Mr. Greenough: We'll stipulate, if your Honor please, that's all we claim, that was his offer, that he would leave his property upon his death to the two boys, and didn't specify in that offer any mode of division between the two of them; that's stipulated.

Mr. Brooke: Then you're stipulating also that the sole consideration was her promise to marry him?

Mr. Greenough: Her marriage to him.

Mr. Brooke: Yes. Are you stipulating that, too?

Mr. Greenough: Well, her marriage to him, and the attendant circumstances, that she left Portland, Oregon, in a comfortable home and happy circumstances and went up to a comparatively strange community; all that follows, necessarily, her marriage. We'll stipulate that."

From the foregoing, it is apparent that the only obligation that Catharina Schlaadt undertook was to marry the said John Henry Kucks and to do whatever was necessary incidental to the consummation of the marriage. It is true she left her home in Portland, moved into the home of John Henry Kucks which he

had maintained for a great number of years in Davenport, Washington. She took with her some of her furniture and personal belongings from Portland, Oregon, to supplement that which John Henry Kucks already owned and apparently had been sufficient for his own needs and that of his former wife for a great number of years. (R. 65, 82.)

We wish to quote from the court's opinion as follows: (R. 149.)

> "Mr. Kizer argued very persuasively on that point, but when we just cooly and calmly consider the facts in this case, it is difficult, it seems to me, to escape the conclusion that Mrs. Schlaadt made only one promise, she promised to do only one thing, and that was to marry Henry Kucks. That was the testimony, and he promised, assuming that the oral agreement was made, he promised that if she would marry him, that he would leave his property to her sons. Now, everything that she did, she did enter into the marriage, but everything else that she did was purely incidental to the marriage; it's something that a wife would be expected and be required to do. She left her home and went to live with him. What bride doesn't? She left her son and her relatives and went where he was living, but isn't that the obligation that is ordinarily imposed upon a wife? So that I can't think of anything that she did here other than entering into the marriage that she would not do, or any bride would not do, any wife would not do and be ordinarily obliged to do and presumed to do in carrying out the marriage arrangement."

The great weight of authority including the State of Washington, indisputably holds that the consummation of the marriage is insufficient performance to

surmount the statute of frauds. With respect to this proposition, the trial court in his opinion said:

> "I also became convinced by the weight of authority that where there is a statute such as the statute of Washington which provides that an agreement, made in consideration of marriage shall be void, that the mere consummation of the marriage is not sufficient to take the case out of the statute of frauds, and that is set out in this note in A. L. R. I don't think there's one case to the contrary shown there; at any rate, the weight of authority is shown to be that way, as also set forth in the rule as stated in the Restatement of Contracts, and I'll say, too, that in my examination of the Washington cases, and of course I am bound so far as substantive law is concerned by the law of the State of Washington and by the decisions of the Supreme Court of the State of Washington, this is a diversity case, that is, one in which the jurisdiction of this court depends upon the diversity of citizenship of the parties, and as I believe Justice Frankfurter remarked in a diversity case, a Federal court is sitting in effect as another court of the state, so I decide this case in exactly the same way, or should, following the same rules of law that one of my brother judges in the Superior Court across the river would decide it if it came to them. I am bound by the laws of the State of Washington so far as substantive law is concerned. Now, a careful reading of the decisions of the Supreme Court gives me no reason to believe that the State of Washington is with the minority in either of the lines of decision which I have just discussed." (R. 146.)

The reason for the rule that marriage is insufficient performance to take an oral contract out of the statute of frauds is that if marriage were held to be sufficient performance to remove the bar of the statute, then

there would be an end to the statute and every parol contract followed by marriage would be binding.

Manning v. Riley (N. J.), 27 Atl. 810.

In *Jones v. Williams* (Vt.), 109 Atl. 803, the court quotes at page 806 from Lord Cranworth in *Canton v. Canton,* L. R. 1 C. H. 137, as follows:

> "That marriage in itself is no part performance within the rule of equity is certain. Marriage is necessary in order to bring a case within the statute, and to hold that it also takes the case out of the statute would be a palpable absurdity."

Finch v. Finch, 10 Ohio 510:

> "It has long been settled that in the absence of actual fraud the fact of marriage is not such a performance as will take an agreement made 'upon consideration of marriage' out of the statute, otherwise the statute would be rendered wholly nugatory; for so far as the fact of marriage is concerned, such agreements are always performed before they become the subject of judicial consideration; and so no case would ever be within the statute."

The trial court reiterated the reasoning set forth in the foregoing cases, in his opinion, as follows: (R. 149.)

> "Well, if we say then that it's true that an agreement in consideration of marriage is void, but if the marriage is performed, the very thing that's contemplated by the statute, that takes it out of the statute, it would mean in effect to invalidate the statute in all those cases where the marriage was actually consummated, and that of course is an absurd conclusion, so that there must be something to take the case out of the statute of frauds, something other than the mere consummation of the marriage."

Note 48 A. L. R. 1356.

"The subsequent marriage of the parties, it has almost invariably been held, is not such part performance as to take an agreement in consideration of marriage, out of the operation of the statute of frauds."

49 Amer. Juris. par. 520, page 819.

"Marriage alone does not take an oral contract to bequeath property out of the statute, which provides that no action shall be brought upon an oral agreement made on consideration of marriage except a mutual contract to marry. Neither does marriage alone take a contract to bequeath property out of a statute providing that no action shall be brought upon an agreement to devise or bequeath property, or to make any provision for any person by will, unless the same is in writing properly subscribed."

49 Amer. Juris. par. 495, at page 796:

"The subsequent marriage of the parties, it has almost invariably been held, does not take an agreement made in consideration of marriage out of the operation of the statute of frauds. Such result is sustained by some authorities on the ground that the doctrine of part performance does not extend to antenuptial parol agreements in consideration of marriage. The same result is reached by other authorities on the ground that marriage alone is not a sufficient part performance of such an agreement. The position taken by the latter authorities is that marriage does not remove an oral promise from the provision of the statute, which declares that a promise in consideration of marriage is not binding unless in writing, since a promise in anticipation of marriage followed by a marriage is the exact case contemplated by the statute. It is said that an express exclusion in the clause of the statute of frauds, which requires a contract in consideration of marriage to be in writing, of mutual promises to marry leaves no

room for a construction that marriage should take such a contract out of the statute."

37 C. J. S. par. 249, at page 758:

"Contracts in consideration of marriage are not taken out of the statute by part performance as by marriage or compliance with other provisions of the contract, even where the contract relates to real property, although there are cases to the contrary."

37 C. J. S. par. 5, at page 517:

"Distinction between agreements in consideration of marriage and in contemplation of marriage repudiated in some states including the State of Washington." Citing *Rogers v. Joughin,* 152 Wash. 448, 277 Pac. 988.

Restatement of the Law on Contracts, Vol. I, par. 192, page 251:

"Topic 3. Contracts Within Class III of Par. 178. (Contracts in Consideration of Marriage.) Par. 192. Promises in Consideration of Marriage, Other Than Mutual Promises to Marry.

"Any promise for which the whole consideration or part of the consideration is either marriage or a promise of marriage is within Class III of par. 178, except mutual promises of two persons that are exclusively engagements to marry each other. * * *

Illustrations:

1. A promises to marry B and, in consideration of A's promise, B orally promises to marry A and to settle Blackacre upon A. The promise to make a settlement is within Class III, and remains unenforceable though the marriage takes place on the faith of the promise.

2. A, to induce B to accept his offer of marriage, promises B orally to make a settlement upon her. B accepts the offer. Both promises to marry, as well as A's promise to make a settlement, are unenforceable.

3. A promises to marry B and, in consideration of A's promise, B orally promises to marry A and forego the rights which the law allows B with reference to A's property. B's promise to forego such right is within Class III, and remains unenforceable though the marriage takes place on the faith of the promise.

4. A, in consideration of B's marrying C orally promises B a settlement. Though the marriage takes place A's promise is unenforceable."

Page, Lifetime Edition, Vol. IV, par. 1721, at page 869:

"If an oral contract to make a will is entered into in consideration of marriage, marriage is not such part performance as takes the case out of the operation of the statute of frauds."

WASHINGTON CASES RE MARRIAGE

The Supreme Court of the State of Washington has always followed the majority rule since this matter was first considered by it, in the case of *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201.

In this case it was sought to be shown by parol testimony that appellant and respondent had an express agreement prior to marriage that when either should die the survivor would have no interest in the decedent's estate. The court held that the agreement was subject to the bar of the statute of frauds notwith-

standing the subsequent marriage of the parties inasmuch as the sole inducement for the agreement was the promise of marriage. This case has been cited with approval in the following Washington cases:

In re Martins Estate, 127 Wash. 44, 49, 219 Pac. 838, 839;

Rogers v. Joughin, 152 Wash. 448, 453, 277 Pac. 988, 990.

That marriage is insufficient to take an oral contract to devise property out of the statute of frauds is also recognized *In re. Fischer's Estate,* 196 Wash. 41, 81 Pac. (2) 836, and in *Luther v. National Bank of Commerce,* 2 Wash. (2) 470, 98 Pac. (2) 667.

The contracts in these two cases were upheld, however, because in the first case there was good and valuable consideration apart from the marriage and in the second case the court expressly held that marriage was not even contemplated by the parties when the contract was made.

Were we to cite all of the cases from other jurisdictions to this proposition, respondent's brief would be endless, so we will confine ourselves to several leading cases exactly in point and which cannot be distinguished from the case at hand:

Fischer v. Fischer (Neb.), 184 N. W. 116.

This was an action to compel the specific performance of an antenuptial agreement which plaintiff claims was made by his mother, Margaret Fischer, with Gothardt Fischer, who was a widower with five children. In consideration of plaintiff's mother mar-

rying Gothardt and taking care of his children, it was understood that Gothardt would make plaintiff an equal heir with his minor children.

The statute involved requiring a contract in consideration of marriage to be in writing is identical with the Washington statute, supra.

Plaintiff contended that the marriage was not the sole consideration for the contract in that there was no duty on the part of Mrs. Fischer to care for the children of Gothardt and when fully performed and carried out was sufficient consideration apart from the marriage. In repudiating this contention, the court at page 119 said:

> "We are clearly of the opinion that the agreement of plaintiff's mother to care for and be a mother to the minor children of Gothardt Fischer furnishes no good or valuable consideration for the contract; but, if it did, it was so connected with the contract of marriage as to make the contract an entirety, and so may not be considered an outside or independent consideration."

Aiken v. English (Kans.), 289 Pac. 464.

The oral contract provided that if decedent would marry plaintiff's mother and bring plaintiff into his home, plaintiff would give him his love, affection and companionship and decedent would leave plaintiff one-half of his property. After the marriage plaintiff went into the home of decedent, gave him his love, affection and companionship and fully performed all of the terms of the contract.

The Court cites and approves *Fischer v. Fischer,*

supra, and in sustaining a demurrer to the complaint, used the following language at page 466:

> "The oral consent of plaintiff to his mother's marriage to Westgate added nothing to the validity of the agreement of his mother and Westgate to marry; and no precedent is cited and we have discovered none which holds that an oral promise to devise property to a third party in consideration of marriage can be enforced. On the contrary, in the well-considered case of *Fischer v. Fischer,* 106 Neb. 477, 184 N. W. 116, 21 A. L. R. 306, it was held * * *"

Hutnak v. Hutnak (R. I.), 81 Atl. (2) 278.

Antenuptial agreement by husband that if wife would marry him and come to the United States from Europe everything they should accumulate should belong to them, not enforcible because marriage was the main if not the sole object of the agreement.

Alexander v. Alexander (N. J.), 124 Atl. 523, at page 524:

"I find nothing in the agreement set forth in the counterclaim, against which this motion is directed, to remove it from the operation of our statute. It was a parol agreement upon the part of defendant, now the wife, that if counterclaimant, her present husband, would marry her at an early date she would, after marriage, apply her income and property to the personal expenses of herself and her husband. It was a parol promise made by her in consideration of marriage; a promise made to induce counterclaimant to marry her. The circumstance that counterclaimant by the marriage may have sacrificed his business prospects or suffered other detriments renders the contract no less one made by defendant in consideration of marriage. Since her promise was made solely in consideration of marriage no element of consideration based upon detriment suffered by him

> can change that plain fact. It is that fact that renders her promise unenforceable."

This case quotes from *Koontz v. Koontz,* 83 Wash. 180, 145 Pac. 201.

Mallett v. Grunke (Neb.), 185 N. W. 310.

Action to enforce specific performance of an alleged oral contract by which plaintiff was to give care and companionship to Louis Kienbaum now deceased in consideration of which she was to receive all his estate. Plaintiff made arrangements to sell her home in Omaha where she lived and moved some of her canned goods and other personal property to Snyder where the deceased resided. We quote from page 311 of the opinion:

> "From a careful reading and analysis of the testimony given by the witnesses for the plaintiff alone we have come to the conclusion that it is overwhelmingly shown that the agreement was an entirety and that it contemplated marriage as its necessary and pivotal feature."

Adams v. Adams (Oregon), 20 Pac. 633.

Court in holding marriage not sufficient part performance of the oral contract said at page 637:

> "But that the parties entered into an agreement whereby the said William agreed to give the appellant the use of the premises for her home during her life, in consideration of her marrying him, is hardly sustained by the testimony. Nor is it shown that any such agreement was sufficiently performed to take the case out of the statute. She did nothing, that I can discover, aside from the marrying, except to go and live upon the premises as William Adams' wife."

Brought v. Howard (Ariz.), 249 Pac. 76.

> "It has been passed upon many times by the courts and the holdings have been all but unanimous to the effect that if the only consideration of an agreement is marriage it must be reduced to writing and signed by the party to be charged. Subsequent marriage will not take such a contract out of the statute. The reason for this exception to the general rule is variously stated, but the clearest and fullest statement is found in *Hunt v. Hunt,* 171 N. Y. 396, 64 N. E. 159, 59 L. R. A. 306, wherein the court, after quoting the statute, said: * * *"

Catharina Schlaadt did nothing that was not incidental to the consummation of the marriage and it is therefore apparent from the foregoing authorities that there was no performance sufficient to remove the ban of the statute of frauds.

APPELLANTS AUTHORITIES RE MARRIAGE AS PERFORMANCE

In all of the cases cited by appellants there was a valid consideration other than marriage or the execution of a will.

> In *re. Fischer's Estate,* 196 Wash. 41, 81 Pac. (2) 836.

The court held that there was sufficient consideration apart from the marriage in that the husband relinquished his separate property amounting to $1500.00 to the community. As pointed out in *Alexander v. Lewes,* 104 Wash. 32, 175 Pac. 572, it is not the quantity but the character of the consideration that controls.

Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729.

Deeds were executed and delivered in complete performance of the contract.

Warden v. Warden, 96 Wash. 592, 165 Pac. 501.

No marriage involved. Court held sufficient performance because nephew went into possession of the land, cleared and cultivated the same, made permanent improvements and boarded and cared for a man suffering from disease.

McCullough v. McCullough, 153 Wash. 625, 280 Pac. 70.

In this case, a father released his daughter to decedent who agreed to adopt and care for his child and bequeath to her the sum of $50,000.00. The father carried out his part of the agreement and the court held there was sufficient performance. No marriage involved.

Herren v. Herren, 118 Wash. 56, 203 Pac. 34.

This case did not involve marriage of the parties and the court simply held that there was sufficient performance by a son who had worked and managed the farm in reliance upon a deed which was duly executed by the husband, conveying an undivided one-half interest.

Slavin v. Ackman, 119 Wash. 48, 204 Pac. 816.

The court held the contract was fully performed because the promisee went into complete possession of the property and made valuable improvements. Marriage was not involved.

Southwick v. Southwick, 34 Wash. (2) 464, 208 Pac. (2) 1187.

Plaintiffs agreed to leave their home in Duluth, Minnesota, and come to the State of Washington to assist in caring for Mr. and Mrs. Sugnet as long as they should live, in consideration of a promise by the Sugnets to leave all of their property to the plaintiffs. Plaintiffs carried out their contract; Sugnet did not bequeath his property to them as agreed. Court properly held that there was full performance of the contract. Marriage not involved.

Perkins v. Allen, 133 Wash. 455, 234 Pac. 25.

The court held valid consideration in that children released interest in their mother's estate to their stepfather. No marriage involved.

Luther v. National Bank of Commerce, 2 Wash. (2) 470, 98 Pac. (2) 667.

In this case marriage did not enter into the agreement. We wish to quote from page 477:

> "As shown by the findings above quoted, respondent agreed (1) to give up her hospital; (2) to nurse and care for decedent the rest of his life; and (3) never to send him to a hospital should his condition become worse, but always to nurse him at home. In return, decedent agreed (1) to build her a 'nice' home and thereafter deed it to her; (2) to provide her a good living; and (3) in case he should predecease her to devise and bequeath to her all the property of which he should die possessed, with the exception of certain nominal bequests."

The court in recognizing the rule that marriage is not a sufficient consideration, stated at page 479:

"*When respondent disposed of her business, dismissed her patients, and refunded their money, as she was required to do, she performed a substantial part of her agreement.* There is no occasion here to invoke that portion of the rule above stated which requires that the act performed 'must of itself give rise to an inference of the existence of the contract,' because here the 'existence of the contract' was fully established by the evidence, and, unquestionably, the act of disposing of her business was done exclusively in pursuance of the contract, and of it alone, *for at that time nothing had been agreed, or even suggested, concerning a possible marriage between the parties.*" (Italics ours.)

Cummings v. Sherman, 16 Wash. 88, 132 Pac. (2) 998.

In this case the mutual wills referred to each other and the survivor probated her husband's estate and took under the will. No marriage involved.

Coleman v. Larson, 49 Wash. 321, 95 Pac. 262.

Promisee entered into possession and made improvements on the land.

Velikanje v. Dickman, 98 Wash. 584, 168 Pac. 465.

Promisee nursed and cared for decedent with a serious illness as long as he lived. No marriage involved.

Alexander v. Lewes, 104 Wash. 32, 175 Pac. 572.

Court points out that the character of the consideration and not the quantity of the consideration is the all important factor in determining whether or not there was sufficient part performance. In this case the court held that there was sufficient performance by the ren-

dition of personal services and the acceptance of a written contract. No marriage involved.

Resor v. Schaefer, 193 Wash. 91, 74 Pac. (2) 917.

Promisee had fully performed by caring for an elderly man. No marriage involved.

Olson v. Hoag, 128 Wash. 8, 221 Pac. 984.

This case involved the maintenance and care of a sick person in consideration of oral agreement to devise property.

D. Execution of Will Not Sufficient Performance.

Catharina Schlaadt and John Henry Kucks were married August 11, 1944, and on May 24, 1945, John Henry Kucks made and executed his last will and testament leaving all of his property to his wife. No mention was made in this will of the plaintiffs or their sister Florence Schlaadt. (R. 17, Ex. 4.)

Had this will remained in effect the plaintiffs would not have been entitled to take under its terms inasmuch as their mother predeceased the testator so it is illogical to say that this will was executed in performance of the alleged contract.

Revised code of Washington, Sec. 11.12.110.

> "When any estate is devised to any child, grandchild, or other relative of the testator, and such devisee or legatee dies before the testator, having lineal descendants, such descendants shall take the estate, real and personal, as such devisee or legatee would have done in case he had survived the tes-

tator. A spouse is not a relative under the provisions of this section."

In re. Renton's Estate, 10 Wash. 533, 39 Pac. 145.

Wife not a relative of her husband within this section and where wife named as beneficiary in her husband's will, dies before the testator, her children by a former marriage would not take under the will.

Thereafter, on February 11, 1946, after the death of Catharina Schlaadt Kucks, John Henry Kucks made a will leaving $500 to Gary Handel and devised two-thirds of his property to Grover C. Schlaadt and one-third to Garfield Schlaadt. (R. 18, Ex. 5.)

On October 22, 1946, John Henry Kucks made another will leaving one-third of his estate to Garfield Schlaadt, one-sixth to Grover C. Schlaadt, one-sixth to the defendants Fred Jahnke and Emma Jahnke, and one-third to the defendants Emil Zimmerman and Kate Zimmerman. (R. 19, Ex. 6.)

On March 2, 1948, he bequeathed the balance due from the sale of his Canada land of approximately $15,000.00 to George Handel, a $1,000.00 bond to Jerry Handel and the balance to the respondents. (R. 19, Ex. 7.)

By his last will dated August 27, 1949, he devised all of his property to the respondents. (R. 19, Ex. 8.)

According to the testimony, Grover Schlaadt was to have the Davenport farm which constituted by far the largest part of the estate, and Garfield was to receive the Canada land. None of the foregoing wills

followed this pattern so we do not see how it can be urged that the wills were executed pursuant to the terms of the oral agreement. (R. 82, 84, 88, 91, 93.)

Granted that the wills were executed in fulfillment of the alleged contract nevertheless the universal weight of authority is that the execution of a will pursuant to the terms of an oral agreement is not sufficient performance of the contract to remove the bar of the statute of frauds.

We quote from the court's opinion:

> "Now, the thing that impressed me in looking over the authorities was, and the more diligently I searched and the harder I worked the more firmly I became convinced, that by the weight of authority, where there is a statute that bars the enforcement or renders void an oral contract to make a will devising real property, the great weight of authority is the overwhelming weight of authority, that the mere making of the will is not sufficient performance to take the case out of the statute." (R. 145.)

37 *C. J. S.*, par. 250 at page 762.

> "*Contracts to make a will or not to revoke a will.*
>
> Although an oral contract to make a will or not to revoke a will may be enforced if there has been a change in position of the parties, other than through marriage, the execution of the will is not such part performance as will take out of the statute of frauds an oral agreement to make a will or not to revoke a will."

The note to this text, 95 at page 762, cites the following Washington cases:

> *In re. Gulstine's Estate,* 154 Wash. 675, 282 Pac. 920;

Cavanaugh v. Cavanaugh, 120 Wash. 487, 207 Pac. 657.

Note 48 *A. L. R.* 1356 at 1361.

"It has been held that the execution of a will pursuant to a verbal agreement in consideration of marriage is not such part performance of the agreement as will take it out of the Statute of Frauds."

In re. Edwall's Estate, 75 Wash. 391, 405, 134 Pac. 1041, 1046:

"The record furnishes no evidence whatever of part performance, unless we regard the mere execution of the wills by both testators as performance. We do not think that the mere making of a will in pursuance of a contract required to be evidenced in writing by the statute of frauds, constitutes a part performance of such a contract so as to render the same enforceable. In *Gould v. Mansfield,* 103 Mass. 408, 4 Am. Rep. 573, answering a similar contention, the court said:

'There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts, or by implication of law from subsequent changes in the condition or circumstances of the testator. Gen. Sts. c. 92, par. 11. The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control.'

"The decision of this court in *Swash v. Sharpstein,* 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796, is in harmony with this view. We conclude that there has been no such part performance as to enable us to recognize the contract under which appellant claims."

Swash v. Sharpstein, 14 Wash. 426, 44 Pac. 862.

The court held that a parol agreement to convey real estate by will made in settlement of a lawsuit was not enforcible under the Statute of Frauds when there had been no act of part performance other than the execution of a will.

McClanahan v. McClanahan, 77 Wash. 138, 143, 137 Pac. 479, 480.

"Then, in the Edwall case, after considering the claim of the appellant that there had been a part performance of the contract relied upon, we held that the making of a will in pursuance of a contract required by the statute of frauds to be evidenced by a writing, did not constitute a part performance of such contract so as to render the same enforceable, and concluded by saying: * * *"

Stevenson v. Pantaleone (Cal.) 21 Pac. (2) 703, at page 705:

" 'There has been no part performance which amounts to anything. The plaintiff says she made a will devising her property to Nancy. But such an instrument was ambulatory, and might have been revoked by various acts or by implication of law from subsequent changes in the condition or circumstances of the testator. * * * The plaintiff's property is still, as it has always been, in her own hands, and subject to her own control.' See, also, *In re. Edwall's Estate,* 75 Wash. 391, 134 Pac. 1041; *McClanahan v. McClanahan,* 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915 A, 461."

APPELLANTS' AUTHORITIES RE. EXECUTION OF WILL

In re. Edwall's Estate, 75 Wash. 391, 134 Pac. 1041.

In this case not only were mutual wills executed but deeds were also executed with the view that the deed of

the one to die first was to become effective. The court held that neither the execution of the deeds nor the wills constituted part performance of the contract.

McClanahan v. McClanahan, 77 Wash. 138, 137 Pac. 479.

The court definitely held that the making of the will did not constitute such performance as to render the contract enforcible.

Cavanaugh v. Cavanaugh, 120 Wash. 487, 207 Pac. 657.

In this case it was held that a verbal contract to compensate a son for services by the making of a will devising real estate was not such part performance as to take the case out of the statute of frauds.

Warden v. Warden, 96 Wash. 592, 165 Pac. 501.

Part performance held sufficient in this case because the plaintiff not only went into possession of the land, cleared and cultivated it and made permanent improvements, but he boarded and cared for an aged man suffering with a disease, all under a direct promise that he should have the land at the old man's death.

Swingley v. Daniels, 123 Wash. 409, 212 Pac. 729.

The court held that there was a complete performance of the contract because not only was there a will but there was a complete transfer of the lands in question by deed.

In re. Fischer's Estate, 196 Wash. 41, 81 Pac. (2) 836.

In this case the husband relinquished his separate property to his wife and also made his will. The court properly held that there was sufficient performance of the oral contract.

A reading of the foregoing cases will indicate that in all of them there was a substantial performance of the contract in addition to the making of the will.

E. Marriage and Execution of Will Insufficient Performance.

Appellant contends that while neither the marriage nor the making of the will standing alone would constitute sufficient performance, nevertheless the two together should be sufficient performance. In reply to this contention the court said:

> "Now, it's been said that although the marriage alone may not be sufficient, and making the will alone might not be sufficient, that the two together should be sufficient. Now, I can't get that reasoning, because it doesn't seem to me that those two things logically and reasonably should be used cumulatively to add to each other or the effect of each one separately, for the reason that I think they pertain to different things." (R. 146, 147.)

Counsel for appellant have not cited a single authority in support of this contention and in all of the following cases it was held that both marriage and the execution of the will did not constitute sufficient performance to lift the ban of the statute.

The case of *Hughes v. Hughes* (Cal.), 193 Pac. 144 is exactly in point.

The defendant promised that if the plaintiff would marry him he would execute and deliver to her his last will and testament devising and bequeating certain real and personal property to her. The parties were married and he executed and delivered to her a will in accordance with the oral agreement. The court held that neither the marriage nor the execution of the will was sufficient performance to take the contract out of the statute.

At page 145:

> "The subsequent making of defendant's will, in favor of the plaintiff, following the marriage, was not such part performance of the oral agreement to make such will as to take the alleged contract out of the statute of frauds. *Gould v. Mansfield,* 103 Mass. 408, 409, 4 Am. Rep. 573; *Swash v. Sharpstein,* 14 Wash. 426, 44 Pac. 862, 32 L. R. A. 796; *In re. Edwall's Estate,* 75 Wash. 391, 134 Pac. 1041, 1046; *McClanahan v. McClanahan,* 77 Wash. 138, 137 Pac. 479, Ann. Cas. 1915A, 461."

Stevenson v. Pantaleone (Cal.) 21 Pac. (2) 703.

Cites Washington cases and holds that the consummation of the marriage and the husband's naming of the wife as beneficiary in his life insurance policy insufficient part performance of oral antenuptial agreement.

Brought v. Howard (Ariz.), 249 Pac. 76.

Equitable action to compel the specific performance of an alleged agreement whereby it was claimed parties agreed to make their wills so that the one first to die should leave all of his or her property to the other. The parties married and wills were executed. The husband subsequently changed his will. The court held that nei-

their the marriage or the execution of the will lifted the ban of the statute of frauds.

Tellez v. Tellez (N. M.), 186 Pac. (2) 390.

Marriage to decedent and making of will pursuant to oral agreement held not to be a sufficient part performance of contract to relieve the same from the operation of the statute of frauds.

Anglemire v. Policemens Benefit Assn. (Ill.), 22 N. E. (2) 713.

Parol promise that if plaintiff would marry defendant, he would name her as beneficiary in certificate of benefit of Association, void under Statute of Frauds. At page 715:

> "Promise of marriage, followed by the marriage, is the exact situation contemplated by the statute. The marriage adds nothing to the circumstances set out by the statutory provision which makes a writing essential. The promise in itself being a nullity, produces no obligation, and any subsequent act of the husband following the marriage must be considered as purely voluntary. Thus, the agreement being void under the statute of frauds, the act of the husband after marriage even though in view of such agreement, must be deemed to be without legal consideration to support it, and as above said, stands therefore upon the same basis as if such act were purely voluntary. Hence the insured had the right to change the beneficiary in the policy as provided by the constitution and by-laws of the Association."

The case of *Busque v. Marcou* (Maine), 86 Atl. (2) 873, decided March 7, 1952, is well worth considering as it is exactly in point, refers to many of the forego-

ing cases and irrefutably answers all of the contentions raised by the appellants.

Prior to their marriage the defendant Joseph Busque agreed with Aurelie Busque that if she would marry him he would execute a last will and testament bequeathing all of his estate to her. Joseph made such a will in compliance with the agreement and they were married. Joseph subsequently made another will revoking the one in favor of Aurelie.

The court not only held that neither the marriage nor the execution of the will constituted sufficient part performance of the contract, but that under no consideration did the execution of the will constitute full performance by the husband.

Because the court disposes of all of the arguments advanced by appellants in this case we wish to quote from the opinion in extenso at pages 876-8:

Busque v. Marcou, 86 Atl. (2) 873, 876-8:

> "In the case of a verbal contract made in consideration of marriage, however, the marriage alone, even though it is an irretrievable change of position, is not a part performance upon which equitable relief can be based. This rule which is firmly established, is based upon the express language of the statute. The marriage adds nothing to the very circumstance described by the statutory provision which makes the writing essential. Unlike the other paragraphs of Section 1 of the statute of frauds, in paragraph III it is the consideration of the contract which brings it within the statute, not the nature of the promise made. To say that in the case of an oral contract made in consideration of marriage the bar of the statute

is removed, even in equity, by the marriage itself would destroy the statute and make it meaningless."

"A very full annotation on this subject is found in 48 A. L. R. 1356 and contains decisions from twenty States and from the English courts sustaining this view. In accord with the overwhelming weight of authority, which is sustained by sound reasoning and irrefutable logic, we hold that marriage alone pursuant to an oral contract in consideration thereof is insufficient either at law or in equity to remove the bar to the enforcement of such contract which is imposed by Section 1, paragraph III of the statute of frauds. Nor did the execution of the first will by Joseph constitute such a partial performance of the contract as would in equity remove the bar of the statute of frauds. Part performance to operate as a bar to the application of the statute of frauds must be part performance on the part of one seeking to charge the other party under the contract, not part performance on the part of the one whom it is sought to charge. As said in the English case of *Caton v. Caton,* 1865, L. R. 1 Sh. Eng. 137, affirmed in 1867, L. R. 2 H. L. 127, 6 Eng. Rul. Cas. 256: 'The preparing and executing of the will cause no alteration in the position of the lady, and I presume it will not be argued that any consequence can be attached to acts of part, performance by the party sought to be charged.'

"The plaintiff claims, however, that this case is that of a wholly executed contract. She says that subsequent to entering into the oral contract, the decedent fully performed his part of the contract by executing a will in accord with the terms thereof and that she performed her part of the contract by entering into the marriage. She further claims that the statute of frauds has no application to contracts which have been fully executed by both parties."

"Although it is true that an oral executory contract which fails to comply with the requirements of the statute of frauds is unenforcible, it is equally true that when the contract has been fully executed it cannot be abrogated for that reason. The position of the plaintiff that the making of the first will by Joseph pursuant to his oral contract so to do, which contract was entered into in consideration of marriage, constituted full performance on his part is not tenable. Mere execution of a will is not full performance on the part of the promissory in such a contract. A will is ambulatory in its nature and may be revoked at any time prior to death. Full performance of the contract on the part of the promissor requires not only the making of the will but also that the will be allowed to remain in force until his death. Whether this condition be the subject of an express promise contained in the oral contract or be implied from the oral promise to make a will in favor of the promisee is immaterial and can make no difference in the result. In either event the promise, be it express or implied, forms a part of the contract and it is made in consideration of marriage, and it cannot be enforced unless the contract or some memorandum thereof is in writing and signed by the promissor. The cases of *Brought v. Howard,* supra; *Zellner v. Wassman,* 184 Cal. 80, 193 Pac. 84; *Hughes v. Hughes,* 49 Cal. App. 206, 193 Pac. 144; *Luders v. Security Trust & Savings Bank,* 121 Cal. App. 408, 9 Pac. (2) 271, and *Caton v. Caton,* supra, are all cases in which it was held that the fact that a will was executed in accordance with an oral contract made in consideration of marriage did not prevent subsequent revocation thereof by the testator. This same principle was also recognized in *O'Brien v. O'Brien,* 197 Cal. 577, 241 Pac. 861. As said in *Caton v. Caton,* supra: 'As a will is necessarily, until the last moment of life, revocable, a contract to make any specified bequest, even when a will having that effect has been duly prepared and executed, is in truth a

contract of a negative nature—a contract not to vary what has been so prepared and executed. I do not see how there can be part performance of such a contract.'

"In *Zellner v. Wassman,* 184 Cal. 80, 193 Pac. 84, 87, the Supreme Court of California said: 'Nor does this case fall within the rule that the statute of frauds cannot be invoked in case of a completed oral contract (*Schultze* (*Schultz*) *v. Noble,* 77 Cal. 79, 19 Pac. 182; *Colon v. Tosetti,* 14 Cal. App. 693, 113 Pac. 365, 366), for the contract now sued upon was not completed. The reason that the contract is now in court is because the decedent did not perform his part of the alleged agreement by causing to be in existence at the time of his death a will bequeathing $5,000 to plaintiff. The mere execution of a will was not a performance of the contract.' "

F. No Fraud Sufficient to Avoid Statute.

Counsel for appellants urge that the statute of frauds cannot be used to perpetuate a fraud and to deny recovery in this case would be using the statute of frauds for the purpose of defrauding the appellants.

The court found that the promise made by John Henry Kucks to Catharina Schlaadt was made in good faith and without any intent to defraud or deceive Mrs. Schlaadt. (Par. IV Findings, R. 16.)

"On the matter of fraud, I think I need say very little on that, as I have indicated it is my conclusion, and I can see no other conclusion that could be reached under the testimony, that Henry Kucks when he made the promise made it in good faith, that there was no fraud, no deceit, and the fact that he did fail to carry out the agreement it seems to me is not sufficient evidence of fraud without something more, so I can't say that the statute of

frauds in this case can be avoided on account of any fraud practiced upon Mrs. Schlaadt by Henry Kucks." (R. 151-2.)

The authorities uniformly hold that the mere failure to carry out the promise which was the inducement for the marriage does not constitute such fraud as will authorize relief in equity in the absence of artifice or trickery.

49 *Am. Jur.* par. 580, at page 886:

"Sec. 580. *What Constitutes Fraud.* While it has often been truly said that the courts, and particularly the courts of equity, ought not to allow the statute of frauds to be used as an instrument of fraud or wrong, or permit the statute to be interposed as a defense where the effect would be to accomplish a fraud, and courts of equity, to prevent the statute from becoming an instrument of fraud, have in many instances relaxed its provisions, it is clear that the mere breach or violation of an oral agreement which is within the statute of frauds, by one of the parties thereto, or his mere denial of an agreement or refusal to perform it, is not of itself a fraud either in equity or at law from which the courts will give relief or which will enable the other party to assert rights and defenses based on the contract. If it were, the statute of frauds would be rendered vain and negatory."

23 *Amer. Juris.* par. 38, page 799:

"It is a general rule that fraud cannot be predicated upon statements which are promissory in their nature when made and which relate to future actions or conduct, upon the mere failure to perform a promise—nonperformance of a contractual obligation—or upon failure to fulfil an agreement to do something at a future time or to make good subsequent conditions which have been assured.

Such nonperformance alone has frequently been held not even to constitute evidence of fraud."

37 *C. J. S.* par. 217, at 714:

"A mere failure or refusal to perform an oral contract, within the statute, is not such fraud, within the meaning of this rule, as will take the case out of the operation of the statute, and this is ordinarily true even though the other party has changed his position to his injury."

The authorities furthermore hold that mere nonperformance of a promise is not in itself evidence establishing fraud or lack of intent to perform.

37 *C. J. S.* par. 116, at page 441:

Rankin v. Burnham, 150 Wash. 615, 617, 274 Pac. 98:

"Respondents may in good faith have asserted their intention to so aid their lessee. Their change of mind, their falure to keep the offer open, does not amount to a fraud. True, the failure of performance of a promise may be without excuse or justification in morals, yet not cognizable as a fraud in law. This statement of intention merely cannot be construed as a fraudulent representation. At most it is only an assertion of a present mental condition."

Carkonen v. Alberts, 196 Wash. 575, 614, 83 Pac. (2) 899, 916:

"A constructive trust, or a trust ex maleficio, can not be established merely upon a broken promise to purchase, or to negotiate purchase of, as agent, lands for another, there being no positive fraud perpetrated other than the breach of the promise."

Fischer v. Fischer, 184 N. W. 116, at page 118:

"In none of the above cases was it held that the parol contract was taken out of the statute of frauds, except where it was shown that the complaining party was induced to enter into the marriage contract by some artifice and deception; and no case has been brought to our attention holding that the mere failure to keep the promise made in the agreement amounts to artifice or fraud. The case before us presents no facts or circumstance of the character just mentioned which would justify a court of equity in disregarding the statute."

Hughes v. Hughes, Cal. 193 Pac. 144, at page 148:

"From our examination of the foregoing, and many other authorities, we are convinced that the distinguishing feature of the case at bar did not amount to such actual fraud as to entitle the plaintiff to any equitable relief. The facts present nothing more than the mere omission to put the contract into writing before the marriage, and a failure to perform it thereafter. It does not appear that the defendant in any manner prevented the due execution of a valid marriage settlement in writing such as would have satisfied the statute. It is not alleged, or contended, that the plaintiff was induced through deceit, false statement, or concealment of the defendant to waive a written agreement and rely upon the promises in parol, before entering into the marriage relation. 2 Pomeroy's Equity Jurisprudence, Fourth Edition, par. 921. For aught that appears in the amended complaint, the defendant may have entered into his engagements in the highest good faith and with every good intention, and with full ability to perform. Granting, for the purpose of the discussion, that the plaintiff may have been led into the marriage by the Lochinvar courtship of the aged swain, the inducement went only to that relation. By no

fraud, trick, or device, so far as the record discloses, was she prevented from securing what the law sanctions, a written marriage settlement. Equity, therefore, can afford her no relief."

Alexander v. Alexander (N. J.), 124 Atl. 523, at page 524:

"Certain English cases are to be found in which parol agreements in consideration of marriage have been enforced under what is known as the 'doctrine of representations'; in Reed on the Statute of Frauds it is stated that cases of that nature do not apparently extend to representations made by the husband or wife to the other, but are confined to representations made by others, such as parents or guardians. 1 Reed on Statute of Frauds, par. 177, at page 289."

Davidson v. Edwards (Ark.), 270 S. W. 94 at page 95:

"It is well settled in this state that a mere refusal to perform a parol agreement, void under the statute of frauds, is not of itself fraud. The reason is that the jurisdiction of courts of equity in such cases is founded upon the fraud and not upon the agreement. It has been well said that the statute of frauds would be forse than waste paper if a breach of promise created a trust in the promisor, which the contract itself was insufficient to raise."

This court has held even though John Henry Kucks had no intention of keeping his promise, it is not such fraud that a court of equity will consider sufficient to grant specific performance.

Levi v. Murrell (9th circuit), 63 Fed. (2) 670, at page 672:

"The appellant seeks to bring the case within the rule sometimes applied in courts of equity, that where there is fraud in connection with the execution of an oral agreement the courts will en-

force the agreement, notwithstanding it is not in writing. The allegation of fraud relied upon in the case at bar is that the decedent made the oral agreement to execute the will without any intention of performing the agreement. Assuming without deciding, that this is a sufficient allegation of fraud, it is not the type of fraud acted upon by courts of equity in connection with specific performance. Such fraud usually relates to some subterfuge by which the promisee is induced to believe the contract has been reduced to writing or is being reduced to writing when in fact it is not. *Zellner v. Wassman,* 184 Cal. 80, 193 P. 84; *Hughes v. Hughes,* 49 Cal. App. 206, 193 Pac. 144."

APPELLANTS' AUTHORITY

The only case cited by appellants on this point is *Mobley v. Hawkins,* 14 Wash. (2) 276, 128 Pac. (2) 289, which is not in point and merely reaffirms the well established rule that where a purchaser or tenant takes possession under an oral contract to purchase or lease real estate and makes substantial improvements, the same constitutes part performance.

CONCLUSION

The judgment of the trial court should be affirmed for the following reasons:

I. The terms of the alleged oral contract were not established by evidence that was conclusive, definite and certain;

II. The oral agreement was void under the Statute of Frauds of the State of Washington;

III. The marriage of Catharina Schlaadt to John Henry Kucks did not constitute sufficient performance of the contract to remove the ban of the statute of frauds. According to the contract, the only obligation upon the part of Catharina Schlaadt was to marry John Henry Kucks and the only things she did were incidental to the consummation of the marriage.

IV. The execution of the wills according to the overwhelming weight of authority did not constitute partial or complete performance because of their ambulatory character and were revoked by the said John Henry Kucks prior to his decease.

V. The alleged fraud consisted merely in the failure of John Henry Kucks to carry out his promise and the unquestioned weight of authority is that such a breach does not constitute fraud of the character sufficient to grant relief in equity.

Respectfully submitted,

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